SUPREME COURT, U. S.

FILED

OCT 8 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-395

JOHN W. NORMAN, *et al.*,

Petitioners,

v.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 11

Appendix—

District Court Order of December 19, 1973 Denying Relief 1a

Opinion of the United States Court of Appeals of June 4, 1974 ..... 5a

Table of Authorities

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) 5

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 9

Arkansas Education Association v. Board of Education, 446 F.2d 763 (8th Cir. 1971) 9

Baxter v. Savannah Sugar Refining Co., 495 F.2d 437 (5th Cir. 1974), Petition for Certiorari filed September 27, 1974, No. 74- 7

PAGE

Bowe v. Colgate-Palmolive Co., 6 EPD ¶8973 (7th Cir. 1973) 8

Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) 8

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 9

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) 8

Hodgson v. Ricky Fashions, Inc., 434 F.2d 1261 (5th Cir. 1970) 9

Jackson v. Wheatley School District, 464 F.2d 411 (8th Cir. 1972) 9

Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969) 7

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 5, 7

Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973), Cert. granted, June 3, 1974 5

Love v. Pullman Co., 404 U.S. 522 (1972) 5

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5

Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721 (5th Cir. 1961) 9

Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973) 8

Norman v. Missouri Pacific R.R., 414 F.2d 73 (8th Cir. 1969) 3

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 6, 7, 8

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 5

PAGE

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) 8
Rogers v. International Paper Co., No. PB 71-C-47 (E.D. Ark. December 11, 1973), pending appeal as Nos. 74-1086, 74-1087, 74-1101, and 74-1115 ..... 6, 10
Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973) 7

Schaeffer v. San Diego Yellow Cab, Inc., 462 F.2d 1002 (9th Cir. 1972) 8
Smith v. Board of Education, 365 F.2d 770 (8th Cir. 1966) 8, 9
Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) 8

U.S. v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), decision on remand, —— F.Supp. ——, 7 EPD ¶9167 (N.D.Ga. 1974) 7
U.S. v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973) 6
United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973) 4, 5, 6

Other Authorities:

29 U.S.C. §3201 et seq. 9

42 U.S.C. §2000e et seq. 2, 3, 6, 9, 10

42 U.S.C. §2000e-5(g) 2

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eight Circuit entered in this proceeding on June 4, 1974, rehearing and rehearing *en banc* denied on July 10, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 594. The opinion of the District Court for the Eastern District of Arkansas is unreported. All opinions are reprinted in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit denying rehearing and rehearing *en banc* was

entered on July 10, 1974 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Whether monetary restitution to black employees who have been discriminated against in employment on account of their race in violation of Title VII, Civil Rights Act of 1964, must be conditioned upon:

(1). proof that the policies and practices of the defendant employer which violated Title VII were maintained in bad faith, and

(2). each black employee's ability to prove the exact amount of his economic harm.

Statutory Provisions Involved

United States Code, Title 42:[1]

> § 2000e-5(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts

[1] This section was changed by the 1972 Amendments to Title VII, P.L. 92-261, March 24, 1972, Sec. 4, to limit back pay liability to a period of two years prior to filing a charge with the Equal Employment Opportunity Commission.

earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

Statement of the Case

This action was filed in 1966 by ten black employees of the Missouri Pacific Railroad alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[2] The plaintiffs alleged that the maintenance of an all-black job classification of "train porter" and a more remunerative all-white job classification of "brakeman" performing substantially the same tasks was in violation of Title VII. The Amended Complaint requested *inter alia* a merger of the classifications and back pay for the black porters. The case was initially dismissed by the District Court on jurisdictional grounds and reversed and remanded for trial by the Court of Appeals. *Norman* v. *Missouri Pacific R.R.*, 414 F.2d 73 (8th Cir. 1969).

Pending trial in the instant case, the Court of Appeals had occasion to review another Title VII railway case involving similar facts and issues concerning appropriate

[2] While originally filed as a class action, the Amended Complaint omitted the class action and Sections 1981 and 1983 allegations.

relief. *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), hereafter referred to as *Frisco*. In *Frisco*, the Court of Appeals sitting *en banc* denied back pay to black porters whom it had determined were victims of the railway's discriminatory practices on the grounds that there was no showing of bad faith in maintaining the illegal practices and that the dates upon which black porters would have become physically unqualified to perform the duties of brakemen were incapable of determination. 464 F.2d at 311.

In view of the factual similarities between *Frisco* and the instant case and further in view of the uniform position of the Circuit on the question of back pay prerequisites, the parties in this case entered into a partial settlement.[3] Reserved for determination by the Court, however, was the question of whether the seven plaintiffs who had retired as porters while the litigation was pending were entitled to seek an upward increase in their retirement pay comparable to what they would be receiving had they retired as brakemen.

Without hearing any factual submission on the issues of disparate retirement income or prior qualifications and abilities, the District Court ruled as a matter of law that the retired plaintiffs were not entitled to the relief sought. Pp. 1a-4a. The Court stated that the claim for increased retirement benefits was indistinguishable from a claim for back pay and that therefore the rationale of the *Frisco* decision precluded such relief.

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[3] The partial settlement, patterned after the *Frisco* relief, provided that porters who were able to perform brakemen duties would be allowed to transfer to that position, carrying one-half of their porter seniority with them. The porters who had not retired by the time of the settlement did so transfer, and of course will retire as brakemen with retirement incomes greater than that of their presently retired co-plaintiffs.

The Court of Appeals affirmed the District Court's decision, reiterating the *Frisco* requirements of bad faith and lack of speculation in calculation. Pp. 5a-11a. In the absence of any factual foundation, the Court stated that it would be impossible for any presently retired train porter to show that he was, at some point prior to his retirement, physically able and otherwise qualified to perform the duties of brakemen. While placing the burden upon the plaintiffs of proving with precision the existence of prior qualifications, the Court concurrently foreclosed them from making such a showing.

Reasons for Granting the Writ

The Fifth Circuit has recently noted that "Title VII litigation is now entering what may properly be termed the 'recovery stage' ". *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974). Prior decisions of this Court interpreting Title VII have included matters of procedure and substance,[4] but the conflict between the decision below and those of other Circuits now requires consideration by this Court of the question of appropriate standards for relief.

The decision below reaffirms the Eighth Circuit's dichotomy established between liability and entitlement to relief under Title VII, requiring bad faith on the part of the discriminator for the latter but not for the former. The Court has also established a standard of placing the burden of speculation as to past entitlements upon the

[4] See, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Love* v. *Pullman Co.*, 404 U.S. 522 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); and *Alexander* v. *Gardner-Denver Co.*, 94 S.Ct. 1011 (1974). See also, *Johnson* v. *Railway Express Agency, Inc.*, No. 73-1543, *cert. granted*, June 3, 1974.

victims of discrimination, effectively frustrating the remedial purpose of Title VII to restore victims of discrimination to their rightful place to the degree possible. These standards for awarding financial restitution to victims of discrimination are squarely at variance with, and have been specifically rejected by, decisions of every other Circuit which has addressed the issue. The decision below is in direct conflict with the uniform interpretation of Title VII adopted by other Circuits, and in conflict with prior decisions of the Eighth Circuit and of this Court on analogous questions.

In two prior decisions interpreting Title VII, the Eighth Circuit has found violations of the Act coupled with financial harm resulting from the discrimination, yet the Court has insulated the discriminators from monetary liability based upon the notion that the defendants had not acted in bad faith in refusing to voluntarily change their illegal practices. *U.S.* v. *St. Louis-San Francisco Ry., supra; U.S.* v. *N.L. Industries,* 479 F.2d 354, 380 (8th Cir. 1973).[5] The decision below also reaffirms the Court's *en banc* decision in *Frisco* holding that equitable relief in the form of back pay must be denied where the formulation of such relief would call for some speculation.

In a series of cases culminating with the recently decided *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 251-63, (5th Cir. 1974), the Fifth Circuit has held that good faith compliance by the defendant with Title VII is an improper basis for denying financial restitution, 494 F.2d

[5] At least one District Court within the Eighth Circuit has applied the rule in *N.L. Industries* to deny back pay because of unfairness to the discriminator since it was not on notice that its practices were illegal prior to the commencement of the lawsuit. See, *Rogers* v. *International Paper Co.,* No. PB 71-C-47 (E.D. Ark. December 11, 1973), Slip Opinion, pp. 36-37, pending appeal as Nos. 74-1086, 74-1087, 74-1101, 74-1115.

at 251. See, *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *U.S.* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); and *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). See also, *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442-3 (5th Cir. 1974). ("It is now settled law in our circuit that good faith is not a defense to an action for class-wide back pay.")[6]

The Fifth Circuit has also adopted a position contrary to the Eighth Circuit's on the issue of the burden placed upon the plaintiff seeking equitable, financial restitution. Recognizing that a reconstruction of past circumstances is "impossible," "pure conjecture," and based upon "probabilities," *Johnson* v. *Goodyear Tire & Rubber Co., supra* at 491 F.2d 1379-80, the Court has determined that the burden initially placed upon the discriminatees is only to show that they have been hired into a particular position because of their race and frozen there because of the operation of a neutral employment practice having a discriminatory impact. Once they have shown that, they are presumptively entitled to financial restitution such as back pay.[7] The burden of proof then shifts to the discriminator to show other facts or circumstances (i.e., physical disqualification) justifying a denial of relief. *Id.* at 1379-80. Accord, *Pettway* v. *American Cast Iron Pipe*

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[6] On September 27, 1974, a Petition for Certiorari was filed raising, *inter alia*, the question of what impact a finding of good faith conduct has upon back pay awards.

[7] The obligation to make financial restitution for Title VII violations has not been limited to back pay, but has been held to embrace prospective retirement income adjustments where the amount of the retirement income has been connected to the illegal employment practice. See, *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 95-96 (3rd Cir. 1973); *U.S.* v. *Georgia Power Co.*, —— F.Supp. ——, 7 EPD ¶ 9167 (N. D. Ga. 1974); *Pettway, supra* at 494 F.2d 263.

Co., supra at 259-60; *Cooper* v. *Allen*, 467 F.2d 836, 840 (5th Cir. 1972).

In addition to the Fifth Circuit, which has dealt with the issue of back pay entitlement more often than any other court, four other Circuits have taken a position contrary to the Eighth Circuit on the question of good faith and speculation. See, *Bowe* v. *Colgate-Palmolive Co.*, not reported in Federal reporter, 6 EPD ¶ 8973 (7th Cir. 1973). ("[E]xact reconstruction of the work history of each employee had the system contained no discriminatory element is impossible. . . . Where resort to presumption is deemed necessary, the presumption should be in favor of the member of the class."); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971) ("intentionally" in Section 706(g) means deliberate rather than accidental); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir. 1971) (defendant's motive and speculative character of award are not defenses to back pay liability); *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973) (good faith not a defense to back pay); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 877 (6th Cir. 1973) ("Good faith by Timken either during the 1965-68 period or thereafter is not a valid defense to a claim for back pay."); and *Schaeffer* v. *San Diego Yellow Cab, Inc.*, 462 F.2d 1002, 1006-7 (9th Cir. 1972) ("It is unfair to force an innocent employee to forego his rights under law while litigation drags through the courts. . .").

The decision below is in conflict with other decisions of the Eighth Circuit on analogous questions. In *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966), a case involving teacher dismissals arising under 42 U.S.C. § 1983, the Court stated:

> "Each of the former Sullivan teachers . . . shall be entitled and shall be afforded the opportunity to

establish, if he can, that he was damaged by his dismissal and the amount of such damage." *Id.* at 784.

See also, *Arkansas Education Association* v. *Board of Education,* 446 F.2d 763, 770 (8th Cir. 1971); and *Jackson* v. *Wheatley School District,* 464 F.2d 411, 413, n. 1 (8th Cir. 1972), holding that back pay for discriminatorily discharged teachers is a necessary and integral form of equitable relief.

Conditioning awards of monetary relief upon the bad faith of the discriminator is contrary to this Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). In *Griggs,* this Court stated that intent of the discriminator was irrelevant to determining liability under Title VII, noting that the Act was directed to the consequences of the employment practice, not to the motivation. One of the consequences of the employment practices found to violate Title VII in this case is that the retired black porters are receiving a lesser retirement income than they would be receiving had they been white while actively employed. Allowing notions of good or bad faith to control relief for the consequences of discrimination is manifestly at variance with the remedial purposes of Title VII.

In cases arising under the Fair Labor Standards Act, 29 U.S.C. 3201 et seq., this Court has repeatedly held that uncertainty and lack of precision in measuring damages resulting from violations of the Act does not preclude an award. See, *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 688 (1946). See also, *Mitchell* v. *Mitchell Truck Line, Inc.,* 286 F.2d 721, 725-726 (5th Cir. 1961) and *Hodgson* v. *Ricky Fashions, Inc.,* 434 F.2d 1261, 1262-1263 (5th Cir. 1970). The Court's decision in *Anderson, supra* at U.S. 687-688, also states that the burden is upon the employee to show that he was in fact a victim of the illegal

practice, shifting the burden to the employer to show with specific proof that the employee is not entitled to the compensation claimed.

The substantiality of the questions presented by this Petition is demonstrated by the position taken by the United States in an *amicus curiae* brief in *Rogers* v. *International Paper Company,* (8th Cir. Nos. 74-1086, 74-1101, 74-1115). Arguing that defenses based upon good faith, speculativeness of damages, and lack of notice should not preclude back pay awards, the Government stated:

> "Every other court of appeals has recognized that back pay is equally important to redress employment discrimination under Title VII. Thus the established law is that back pay is required to make whole the victims of such discrimination unless extraordinary circumstances are present which would render such an award unjust." Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae, p. 45.

The Equal Employment Opportunity Commission pointed out that allowing such defenses to prevail over the economic harm done to the victims of discrimination "creates an unnecessary amount of conflict with established law in this and other circuits." *Id.* at p. 48.

In formulating the appropriate relief for cases involving discrimination in employment, monetary relief should be a central concern of the courts. To emasculate the back pay provisions of Title VII as the Court has done in the decision below will have the effect of freezing an entire generation of victims of discrimination into an economic pattern which existed prior to the Act.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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